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Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for	)	WT Docket No. 97-192
Relief From State and Local Regulations	)	
Pursuant to Section 332(c)(7)(B)(v) of	)	
the Communications Act of 1934	)	

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U S WEST, INC. REPLY COMMENTS

U S WEST, Inc. ("U S WEST") submits this reply in response to the comments filed in the above-captioned rulemaking proceeding.[1] U S WEST limits this reply to the principal argument made by local government interests: that localities are free to regulate CMRS carriers by requiring them to demonstrate separately to the satisfaction of local governments that their facilities comply with federal rules. This position is contrary to law and sound public policy and should be rejected by the Commission.

The Commission has recognized the fact that all scientific studies have found that exposure levels due to radio-frequency ("RF") emissions from CMRS transmitters typically are "*thousands of times below* the levels considered to be safe by expert entities such as the Institute of Electrical and Electronics Engineers, Inc. (IEEE), and the National Council on Radiation Protection and Measurements (NCRP), as reflected in the Commission's rules governing RF

[1] *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, *Notice of Proposed Rulemaking*, FCC 97-303 (Aug. 25, 1997)("*Notice*").

emissions."[2] As a result, and pursuant to the directives of the National Environment Policy Act ("NEPA") and its implementing regulations, the Commission has categorically excluded many CMRS transmitters from the requirement of conducting even routine environmental evaluations.[3] With respect to those CMRS transmitters which "*may* have the *potential*" to exceed safety guidelines,[4] the Commission has required carriers to conduct a routine evaluation to ensure that the particular transmitters in question, in fact, pose no risk to public health and safety.[5] These comprehensive RF rules "represent a consensus view of the federal agencies responsible for matters relating to the public safety and health."[6]

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[2] FCC Fact Sheet No. 2, National Wireless Siting Policies, at 12 (Sept. 17, 1996)(emphasis added).

[3] *See* 47 C.F.R. § 1.1306.

[4] *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* ET Docket No. 93-62, *Report and Order*, 11 FCC Rcd 15123, 15157 (1996)("*RF Order*")(emphasis added).

[5] *See* 47 C.F.R. § 1.1307. This initial assessment will determine whether a CMRS carrier needs to take additional steps, whether through mitigation (*e.g.,* fencing, shielding) or the preparation of an environment assessment for submission to the Commission and approval prior to construction commencement.

[6] *RF Order,* 11 FCC Rcd at 15124. Local and state officials familiar with this complex subject have reached the same result. For example, the California Public Utilities Commission determined even before the express federal preemption enacted in Section 332(c)(7)(B)(iv) that cellular transmitters posed no risk to public safety:

> Scientific studies have not indicated any obvious relationship between prolonged lower-level RF radiation exposure and increased mortality or morbidity, including cancer. In addition, the power densities measured close to cellular towers were not found anywhere near the power densities used in the scientific experiments. *Potential Health Effects of Electric and Magnetic Fields of Utility Facilities,* Decision 95-11-017, 165 P.U.R. 4th 403 (CaPUC 1995).

(continued...)

Local governments have not challenged this regulatory regime in the past. Even today, no local government explicitly challenges the Commission's exclusive authority to establish radiation standards, its expertise over this complex subject, or the adequacy of the Commission's substantive RF emissions rules and guidelines.[7] However, some local governments now assert that the Commission's enforcement mechanisms — categorical exclusion of some CMRS transmitters and routine evaluation/environmental assessment of other transmitters — are inadequate and that therefore local governments should be able to force CMRS providers to prove through actual measurements and required documentation that their transmitters meet Commission RF emissions guidelines.[8]

There are three major legal defects with this local government argument. First, nowhere is there a statute empowering local governments to enforce federal rules. Second, Section 332(c)(7)(B)(iv) of the Communications Act *expressly prohibits* local governments from "regulating" CMRS transmitters "on the basis of the environmental effects of [RF] emissions to the extent that such facilities comply with the Commission's regulations concerning such

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[6] (...continued)

Similarly, the Seattle-King County Department of Public Health, after reviewing "hundreds" of CMRS radiation reports, concluded that it "*did not* find any of these proposed facilities even remotely close to the [MPE] standard of the FCC and our local codes" and that CMRS facilities are "not . . . a threat to public health." AT&T Wireless Exhibit 1 (emphasis in original). Notwithstanding the conclusion of its own expert, the City of Seattle nonetheless opposes any attempt to limit the documentation which localities can require of CMRS providers. Seattle at 3-4.

[7] *See, e.g.,* National League of Cities at 3 and 22; City of New York at 2; Concerned Communities and Organizations at 14. *See also* Cellular Phone Taskforce at 6-7.

[8] *See, e.g.,* Concerned Communities and Organizations at 17-18, and 20; National League of Cities at 24-25.

emissions."[9] According to the local government commenters, notwithstanding the plain mandate of the Act, localities should be permitted to regulate CMRS providers (by requiring a demonstration of compliance to their satisfaction) in order to prove that they cannot regulate CMRS providers and their transmitters. This is a curious legal argument, at best.[10]

The third legal problem with the local government argument is that the Commission's RF emissions enforcement rules are based on the requirements of NEPA. NEPA regulations direct the Commission to exclude from any environmental assessment those activities which do "not individually or cumulatively have a significant effect on the human environment and which have been found to have to have no such effect."[11] The Commission determined over a decade ago and reaffirmed in August 1996 and August 1997 that many CMRS facilities do not pose a significant effect on the environment and should, as a result, be excluded from any

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[9] 47 U.S.C. § 332(c)(7)(B)(iv).

[10] Local governments argue that Commission jurisdiction over RF matters is "quite narrow" and "strictly limited." National League of Cities at ii and 5. *See also* Local and State Government Advisory Committee ("LSGAC"), Recommendation No. 7 at ¶ 2. As U S WEST understands it, the theory of this argument is as follows: Section 332(c)(7)(B)(iv) is an exception to an exception because (a) Section 332(c)(7) is an exception to the general Section 332(c)(3) prohibition over local government regulation of CMRS and (b) Section 332(c)(7)(B)(iv), giving the Commission preemption authority over RF issues, is an exception to the first exception — *ergo*, the Commission's jurisdiction is constrained. Local governments have it backwards. The Commission has always had exclusive jurisdiction over radio technical matters. *See* U S WEST at 1 n.2. Moreover, in enacting Section 332(c)(7), Congress expressly specified that this provision is "not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities." H.R. Conf. Rep. No. 104-458, at 209 (1996). Thus, Section 332(c)(7)(B)(iv) simply reaffirms the Commission's pre-existing authority over radio technical matters.

[11] 40 C.F.R. § 1508.4. *See generally* U S WEST at 7-8.

environmental processing.[12] Local governments have not challenged these Commission conclusions.[13] Consequently, the new local government argument that "we must now be free to require carriers to demonstrate compliance" challenges, *not* the Commission's decisions, but the very structure of NEPA and its implementing regulations. Local governments ignore the fact that the Commission has no choice but to follow the overarching requirements of NEPA.[14]

Legal issues aside, the local government argument that they must now have authority to require carriers to demonstrate RF compliance also suffers from a basic flaw in public policy: the recommended approach makes no practical sense. At the outset, the issue is *not* compliance with Commission rules, as the commenting local governments suggest.[15] Radio licensees are already required to comply with Commission environmental rules, and the Commission has made clear that violations of its rules will be punished severely.[16] Besides,

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[12] *See Responsibility of the Federal Communications Commission to Consider Biological Effect of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices, Second Report and Order*, 2 FCC Rcd 2064, 2065-66 (1987); *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation* ET Docket No. 93-62, *RF Order,* 11 FCC Rcd at 15156; *Second Memorandum Opinion and Order,* FCC 97-303 (Aug. 25, 1997).

[13] Localities have certainly not submitted any facts suggesting that these Commission conclusions were erroneous in any way. Further, local governments are now time-barred from raising such arguments. *See* U S WEST at 13 n.39.

[14] Completely baseless (and unsupported by any legal authority) is the assertion that NEPA requirements are "separate and unrelated" and have "no bearing" on state and local government jurisdiction. *See* Concerned Communities and Organizations at 14. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1. *See also* U S WEST at 7.

[15] *See, e.g.,* National League of Cities at 29 ("The only issue is whether a provider is complying with those requirements.").

[16] *See, e.g., Centel Cellular of North Carolina, Memorandum Opinion and Order,* 11 (continued...)

interested parties, including local governments, have always had the right to petition the Commission if they have reason to believe that a particular transmitter does not comply with Commission rules and guidelines — although U S WEST is not aware that petitions filed by local governments over the years.[17]

The issue rather is whether local governments may regulate CMRS providers to demonstrate separately compliance with federal requirements. There is no reason whatsoever to require CMRS providers to demonstrate to local officials that each of their thousands of CMRS transmitters complies with the Commission's RF guidelines — particularly when the typical CMRS transmitter is "thousands of times below the levels considered to be safe by expert entities."[18] Even if the Commission had a choice in the matter (which it does not under NEPA), the Commission has found through a separate rulemaking that requiring even routine evaluation of categorically excluded facilities "would place an unnecessary burden on licensees."[19] Requiring demonstrations of compliance would not only contravene existing Commission

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[16] (...continued)
FCC Rcd 10800 (1996)(imposing $2 million forfeiture for FAA violation).

[17] *See* 47 C.F.R. § 1.1307(c). Local governments thus misstate the issue in asserting that the FCC is attempting "to remove local authority to monitor radiation." Concerned Communities and Organizations at 3. Local governments are free to conduct their own tests; what they cannot do is require CMRS providers to do the testing for them. In this regard, there is no need for local governments to conduct site visits as the LSGAC recommends because the relevant inquiry — radiation exposure to the public — is most appropriately measured adjacent to the site where the public may roam. Besides, locally-prescribed "site visits" constitute the very "regulation" prohibited by Section 332(c)(7)(B)(iv).

[18] *See* note 2 *supra.* Given this fact, it is entirely appropriate for the Commission to adopt a rebuttable presumption of compliance. *See Notice* at ¶¶ 151-54.

[19] *RF Order,* 11 FCC Rcd at 15156.

rules,[20] but it would also require the CMRS industry to incur sizeable costs and delay unnecessarily service deployment for no meaningful purpose.[21]

The record does not reveal that there is a problem with licensee compliance with the Commission's RF environmental rules, much less a pervasive problem requiring the Commission to reevaluate its enforcement mechanisms.[22] Local governments instead claim a need to require a demonstration of compliance to satisfy the expressed needs of some of their constituents.[23]

U S WEST understands that local officials must be responsive to their constituents. But if certain constituents do not understand (or are unwilling to accept) that the exposure level of a typical CMRS transmitter is thousands of times below the safety levels

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[20] *See* 47 C.F.R. §§ 1.1306, 1.1307.

[21] *See, e.g.,* San Francisco at 7 (noting its demonstration of compliance process is "cumbersome").

[22] The City of San Francisco does attach an affidavit noting that certain CMRS providers have retained experts who have determined that a handful of proposed transmitters would not comply with FCC rules without undertaking some mitigation (such as fencing). U S WEST has no doubt that this local official believes he performs an important function. But the fact remains that, even if this local official's position did not exist, the CMRS providers in question would still be required by FCC rules to undertake necessary mitigation, and non-compliance would subject CMRS licensees to sanctions. Similarly, a consultant complains about a CMRS site in Charlotte, Vermont even though he readily admits that the emissions from this base station have "never been a major issue" and that the typical CMRS transmitter has a "relatively low percentage of MPE." Mark Hutchins at 2 and 3. It bears repeating that FCC rules expressly allow interested persons to petition the FCC if they believe a particular site is not complying with FCC rules. *See* 47 U.S.C. § 1.1307(c). Further, non-compliance with RF requirements will subject CMRS licensees to sanction.

[23] *See, e.g.*, National League of Cities at 4, 21, and 29.

recognized by experts, these same constituents are not in a position (nor should they) to evaluate and review complex data in a radiation study proving the obvious.[24]

U S WEST submits that Congress well understood the issues surrounding RF emissions in enacting Section 332(c)(7)(B)(iv) of the Communications Act. It understood that the citizenry is not well-positioned to understand the complex subject of RF engineering and harmful RF emissions and that, as a result, local governments might be encouraged to regulate emissions, not because of a need for regulation but to respond to unsupported constituent fears. The Congress further understood that its objective of facilitating rapid CMRS entry throughout the nation could well be jeopardized if CMRS providers were required to document RF compliance to people who think the CMRS industry should be prosecuted for homicide or who are convinced they feel massive radiation from towers emitting emissions a thousand times below levels deemed safe by the experts.[25] Indeed, U S WEST submits that it was for this very reason that Congress expressly gave the Commission broad preemption authority over "any action" (not just final actions) by a local government which attempts to "regulate" CMRS transmitters "on the basis of the environmental effects of RF emissions."

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[24] *See, e.g.,* National League of Cities at 24 ("[M]embers of the public cannot be expected to understand such technical distinctions.").

[25] *See, e.g.,* Mrs. Dealy-Doe-Eyes Maddux at 1 (FCC should "prosecute the CTIA for all of the homicides that [its members] have caused and will cause."); Ms. Diane Haavind at 1 ("I felt a massive radiation field on Monday, October 6" from a nearby CMRS site.). While some members of the public have fears about the health risks associated with CMRS transmitters, U S WEST cannot agree that these fears are "genuine" (*see* National League of Cities at 22) given the absence of scientific evidence that FCC-compliant transmitters pose a risk to public health.

One final comment is in order. Completely baseless is the local government charge that the Commission is not committed to public health and safety.[26] Local governments do not challenge the adequacy of the RF emission rules and guidelines which the Commission adopted in consultation with other expert agencies such as the EPA. And while they now criticize the Commission's enforcement mechanisms, they present no facts even suggesting that the Commission misapplied relevant legal criteria in categorically excluding some CMRS transmitters from any separate environmental assessment and in requiring other transmitters to undergo routine evaluation assessments. In the end, the local government complaint is not with this Commission, but with the environmental scheme Congress adopted almost 30 years ago. Moreover, to confirm, *no* public health or safety concerns are presented by enforcement of the federal RF regulatory scheme. Wireless carriers are committed to pursue practices that ensure public health and safety at their facilities. Simply put, the concern expressed by local governments in this area is wholly misplaced.

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[26] For example, the National League of Cities asserts that the rulemaking proposals "reflect a disturbing Commission predilection to elevate the interests of industry over the health, safety and aesthetics interests of not only local governments, but of the citizens they are duty-bound to represent." League at 29 n.10. Similarly, the Concerned Communities and Organizations contend that the Commission's proposals place "the welfare of the industry it regulates ahead of the safety and welfare of citizens" because the Commission places "*first* priority on 'minimizing the burden on service providers' whereas the *first* priority always must be on safety." Concerned Communities at 17 (emphasis in original).

For the foregoing reasons and those set forth in its comments, U S WEST urges the Commission to deny the request of local governments to require CMRS providers to demonstrate to their satisfaction that carrier facilities comply with Commission rules. Indeed, under both Section 704 of the Telecommunications Act of 1996 and NEPA, the Commission cannot grant the relief requested by local governments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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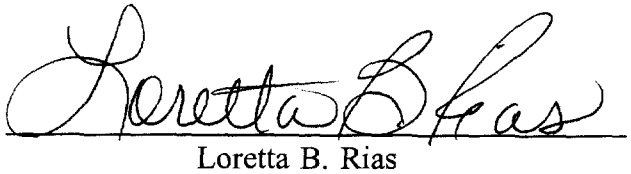

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